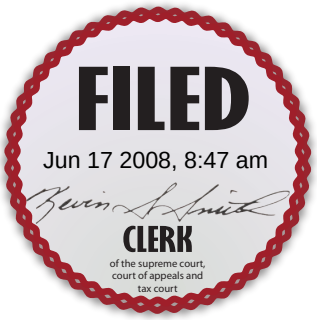

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IN THE
COURT OF APPEALS OF INDIANA

DAVID PATRICK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0710-CR-846
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John W. Hammel, Judge
Cause No. 49F24-0602-FD-31055

June 17, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Pursuant to a plea agreement, David Patrick pled guilty to Criminal Trespass, as a Class D felony.[1] The plea agreement capped the potential executed sentence at one year and left the probationary term to the discretion of the trial court. Patrick appeals his sentence of three years imprisonment with two years suspended to probation, contending that it is inappropriate under Indiana Appellate Rule 7(B). We affirm.

Discussion and Decision

Our Supreme Court recently reviewed the standard by which appellate courts independently review criminal sentences:

> Although a trial court may have acted within its lawful discretion in determining a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of a sentence through Indiana Appellate Rule 7(B), which provides that a court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. The burden is on the defendant to persuade us that his sentence is inappropriate.

Reid v. State, 876 N.E.2d 1114, 1116 (Ind. 2007) (internal quotation and citations omitted). Patrick's challenged sentence is for a Class D felony. The range of possible sentences for a Class D felony is between a minimum of six months and a maximum of three years with an advisory sentence of one and one-half years. Ind. Code § 35-50-2-7.

As to the nature of the offense, Indianapolis Police found Patrick sitting in Senate Manor Apartment number 101 to which he had been denied access on a prior occasion. The offense was elevated to a Class D felony because Patrick has a prior unrelated criminal

trespass conviction concerning that same apartment.

As to the character of the offender, Patrick pled guilty pursuant to a plea agreement in which the State agreed to dismiss two other charges. We do not believe Patrick's decision to plead guilty is significant in regards to evaluating his sentence due to the benefit he received from the State and that the decision based on the evidence was a pragmatic one. See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999) (A guilty plea does not rise to the level of significant mitigation where the evidence against the defendant is such that the decision to plead guilty is merely a pragmatic one.)

Beyond this, the record is sparse regarding facts of Patrick's character. No presentence investigation report is included in the materials presented on Patrick's appeal. In fact, there is no indication that a presentence report was ever completed. Indiana Code Section 35-38-1-8(a) provides in relevant part: "Except as provided in subsection (c), a defendant convicted of a felony may not be sentenced before a written presentence report is prepared by a probation officer and considered by the sentencing court." Subsection (c) provides an exception that where the defendant is convicted of a Class D felony, the trial court may impose sentence without considering a written presentence report. I.C. § 35-38-1-8(c). As Patrick was convicted of a Class D felony, the exception of Subsection (c) applies in this case. In fact, the trial court asked defense counsel if she was going to waive the presentence investigation, and defense counsel responded affirmatively. Trial transcript at 7.

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[1] Ind. Code § 35-43-2-2.

Without a presentence report, we are left only with the record of the sentencing hearing with which to review for facts regarding the defendant's character. Here, the record is void of detailed facts. No witnesses were called nor any evidence submitted. The substance of the hearing transcript pertaining to the basis for the length of Patrick's sentence is argument by counsel and the trial court's pronouncement of the sentence. The arguments presented by counsel note that Patrick has a criminal history consisting of crimes related to alcohol abuse. These references are made without detail as to the nature or number of convictions. The only comment as to the gravity of the convictions is the characterization by defense counsel of the crimes as nuisance crimes. The trial court uses this "long string of alcohol-related offenses" as its basis for sentencing Patrick to three years with two years suspended to probation. Tr. at 12.

On appeal, Patrick contends that his sentence should be reduced because "the record is nearly devoid of information about [his] character, so much so that it can not fairly be described as 'the worst.'" Appellant's Brief at 4. However, the state of the record is due in large part to Patrick's decision to not have a presentence report completed, call witnesses or submit evidence. Based on comments of counsel and the trial court, we assume that they had copies of Patrick's criminal record during the sentencing hearing. This information was not included in the record, and thus, not available to us on review.

The defendant has the burden to persuade the appellate court that his or her sentence has met the inappropriateness standard of review. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). While a defendant convicted of a Class D felony can forgo the creation of a

presentence report, this limits the information in the record available for review, especially in circumstances such as these where no witnesses were called to testify at the sentencing hearing. Patrick acknowledges a criminal history, but there is no detail in the record regarding the nature and the extent of this history. Without the history, we are unable to perform a meaningful independent review of his sentence. Moreover, when performing a review under Indiana Appellate Rule 7(B), we give deference to the trial court's decision because of the unique perspective a trial court brings to its sentencing decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

For whatever reason, Patrick did not include in the record a presentence report. Thus, given the record before us, Patrick has failed to persuade us that his sentence is inappropriate.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.